

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 323 OF 2006

The State of Maharashtra,
Through Police Station Officer,
Police Station, Pandharkawada.

.... **APPELLANT.**

// VERSUS //

1. Mamta Dilip Madavi,
Aged about 29 years,
2. Dilip Ganpat Madavi,
Aged about 38 years,
3. Sau. Mangala Namdeo Mohurle,
Aged about 32 years,

All R/o. Adarsh Colony,
Pandharkawada, Tq. Kelapur,
Distt.Yavatmal.

.... **RESPONDENTS.**

Shri A.M.Kadukar, A.P.P. for Appellant.
Shri P. R.Agrawal, Advocate for Respondent Nos. 1 & 2.
Shri M.I.Dhatrak, Advocate for Respondent No.3.

CORAM : N.W.SAMBRE AND N.B.SURYAWANSHI, JJ.
DATED : FEBRUARY 27, 2020.

ORAL JUDGMENT : (Per : N.B.Suryawanshi, J.)

1. Heard.

2. The State has questioned acquittal of the appellants/ accused under Section 302 of the Indian Penal Code in Sessions Trial No. 96 of 2004 recorded by the learned Additional Sessions Judge, Pandharkawada (Kelapur).

3. The prosecution case rests upon the dying declaration Exh.48, recorded by P.W. 6-Investigating Officer-Ramkrushna Lanjewar, which was recorded on 25/09/2004 at Government Hospital, Pandharkawada. Deceased Manda wife of Digambar Padmalwar has stated in the dying declaration that on 25/09/2004 at about 2.00 O'clock in the afternoon, when she was alone in the house, accused No.1-Mamta Deelip Madavi (residing as tenant in her house), her husband accused No.2-Deelip Ganpat Madavi and accused No.3-Mangala Namdeo Mohurle, all residents of Adarsh Colony, entered her house, abused her and said that "*Aaj Tula Khatam Karto*". By saying so, they picked up kerosene can from her house, poured it on her person and then Mamta ignited match stick and set her on fire. She and Mamta used to regularly quarrel over the issue of vacating the house. That day also they quarreled over the said issue only. The trio thus, have set her on fire by pouring kerosene.

4. After recording dying declaration Exh.48, P.W. No.6-Investigating Officer registered F.I.R. bearing Crime No. 200 of 2004 (Exh.49) under Sections 307, 452 read with Section 34 of the Indian Penal

Code against the accused persons. Thereafter he recorded spot panchnama and conducted investigation, also recorded statements of P.W. No.1-husband of the deceased and P.W. No.2-son of the deceased, both have claimed that the deceased has made oral dying declaration in their presence. Manda was latter shifted to the Government Hospital at Yavatmal and succumbed the injuries on 25/09/2004 at 7.30 p.m. Section 302 of the Indian Penal Code was added in F.I.R./Crime No. 200 of 2004.

5. After completion of investigation charge-sheet came to be filed and accused were chargesheeted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and under Section 452 read with Section 34 of the Indian Penal Code.

6. The prosecution examined in all 6 witnesses in support of its case. The learned trial Court after considering the evidence on record acquitted the accused persons of all the charges. Hence, the present appeal is filed by the prosecution.

7. Heard learned A.P.P, who has assailed the judgment on the ground that in spite of there being dying declaration Exh.48 proved on record by the prosecution and oral dying declarations proved in the evidence of P.W. 1 and P.W. 2, the learned trial Court has wrongly appreciated the evidence on record and has erroneously acquitted the accused persons. He,

therefore, submits that the impugned judgment and order of acquittal is unsustainable and the same is liable to be quashed and set aside and the accused are liable to be convicted.

8. Per contra, the learned Advocate for the accused contends that the dying declaration Exh.48 is not reliable and is rightly discarded by the learned trial Court. The evidence of prosecution witnesses is full of omissions and contradictions and they contradicts each other on material particulars. The learned trial Court has rightly appreciated the evidence and was justified in acquitting the accused persons. No interference is called for in the impugned judgment and order of acquittal.

9. We have perused the record and evidence. The dying declaration Exh.48 is recorded by PW. 6-Investigating Officer, the same is signed by two witnesses namely A.K. Gangulwar (PW. No.5) who also happens to be panch witness for spot panchnama Exh.43 and one more witness N.V. Deshettiwar. Admittedly, both the witnesses belong to Beldar caste which is also the caste of the deceased and PW. Nos. 1 and 2. PW. No.5 was also President of Beldar Association at the time of incident. The dying declaration does not record timing as to when it commenced and when it ended. At the time of commencing dying declaration certificate of Doctor was not obtained and only at the end of the dying declaration the Doctor stated that patient was conscious and oriented during her statement. PW. No.3 has given vital admissions in his cross-examination that he has not

mentioned time at his endorsement marked as Exh. "X" and Exh. "Y" that he has examined the patient. He further admitted that in order to ascertain the mental fitness the doctor has to ask some general questions to the patient. So also the doctor has to examine pulse beats, blood pressure and heartbeats. He did not bring the case papers of the patient with him. He admitted that he gave patient injection T.T, I.B. Fluid, antibiotics, pain killer and dressing. He also accepted that if the patient is within 90 to 100% burns there is initiation of congestion of vital organs.

10. Thus, it can be seen that the dying declaration Exh.48 is not reliable for absence of certificate of the Doctor certifying the sound mental state to give statement mentioning timing of commencement and at the end of the dying declaration. For presence of the two witnesses PW. No.3 and PW. No.5 the dying declaration was not read-over to the deceased after recording it and no confirmation was sought from her that the statement is correctly recorded and the same is true. In view of these lacunae the dying declaration cannot be relied upon. The dying declaration is unreliable also on the ground that there was a strong possibility of tutoring to the victim which is fortified by the presence of two witnesses who have signed the dying declaration. The dying declaration appears to be suspicious also on the count that the deceased had suffered 97% burn injuries and she was administered pain killers and antibiotics. In that view of the matter, it is difficult to accept that she was in a fit condition to give dying declaration.

11. The evidence of P.W. Nos.1 and 2 in respect of the alleged oral dying declarations made to them is also doubtful. It is pertinent to note that for the first time after the incident dated 25/09/2004 a statement of P.W. No.1 was recorded on 28/09/2004. The Investigating Officer has specifically admitted that for the first time after the incident dated 25/09/2004 a statement of P.W. No.1 was recorded on 28/09/2004. The Investigating Officer has specifically admitted that P.W. No.1 till 28/09/2004 did not make any complaint and/or give any statement that the accused persons have set Manda on fire. The Investigating Officer also admits that though they were available on 26/09/2004, 27/09/2004 and 28/09/2004 no such statement was made. Even P.W. No.2 (son of deceased) till 29/09/2004 has not stated to the Investigating Officer about the occurrence.

12. P.W. No.1 deposed that the deceased told him that accused No.1-Mamta, accused No.2-Deelip poured kerosene on her person and set her ablaze. He admits that his house is located in thickly populated area and two months prior to the date of occurrence he told the accused Nos. 1 and 2 to vacate their house. He further states that Sandip came to the house when he was shifting his wife to the hospital, near the gate of his house and Sandip went to the Police Station from there. He also admits that he had not talked with Sandip about occurrence when he started for Police Station. The evidence of this witness is full of omissions which are proved on record by the defence through the Investigating Officer. He also claims to be present

along with his wife all the while from the incident of burning till she died in the hospital at Yavatmal. Thus, the presence of this witness at the time of recording dying declaration cannot be ruled out.

13. PW. No.2, son of the deceased, claims that he returned to the house on the date of incident at about 1.00 p.m. and he saw rush of people in front of his house. He rushed in the house and saw his mother in burnt condition and when he reached near her she called his name “*Sandip-Sandip*” and told him that all the accused Nos. 1 to 3 burnt her. He further states that his mother told him that accused Nos.1 and 2 set her on fire and accused No.3 was instigating them. The evidence of this witness is also full of omissions. There is inconsistency in respect of oral dying declarations given to PW. No.1 and PW. No.2 . Even according to PW. No.1, PW. No.2 met PW. No.1 and the deceased at the gate and there was no talk between them about the occurrence and immediately PW. No.2 went to Police Station. In this view of the matter it is unsafe to rely upon the oral dying declaration alleged by PW. Nos. 1 and 2 also on the ground that they are inconsistent and PW. Nos. 1 and 2 are contradicting each other on material particulars.

14. The spot panchnama reveals that there was gas cylinder in the house of deceased. The extent of burns received by the deceased suggests that the burn injuries received by her were due to suicidal attempt. It is also not possible to accept that she did not raise any hue and cry and nobody

approached her though she was residing in thickly populated area. PW. No.5 was present at the time of recording dying declaration also is panch to the spot panchnama.

15. In the light of aforesaid reasons, we are of the considered view that no case is made out by the prosecution to warrant interference in the order of acquittal passed by the learned trial Court. The learned trial Court has taken plausible view and we do not find any reason to interfere with the view taken by the learned trial Court. The appeal being devoid of merits it needs to be dismissed. Hence, the following order:

- i) Criminal Appeal filed by the State is **dismissed**.
- ii) The bail bonds, if any, stand cancelled.
- iii) The muddemal property be dealt with according to law.

(N.B.SURYAWANSHI, J)

(N.W.SAMBRE, J)